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IN THE

Supreme Court of the United States

October Term, 1940

No. 65

FRANK L. KLOEB, JUDGE OF THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO, WESTERN DIVISION,

Petitioner and Respondent Below,

vs.

ARMOUR & COMPANY, AN ILLINOIS CORPORATION,

Respondent and Petitioner Below.

BRIEF OF PETITIONER

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SUBJECT INDEX

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Respondent.

BRIEF IN BEHALF OF PETITIONER

I.

OPINIONS BELOW

The first opinion in the Circuit Court of Appeals for the Sixth District was filed on December 5, 1939, and appears in the record, page 66 *et seq.* It is reported in 109 Fed. (2d) 72.

The second opinion of said court has not been reported, but was rendered on March 12, 1940, and is found at page 71 of the record.

II.

JURISDICTION

1. The statutory provision which is believed to sustain the jurisdiction of this court is Judicial Code, Section 240(2), as last amended by the Act of Congress, approved June 7, 1934, C. 426, 48 Stat. 926. (Title 28, Sec. 347(a) U. S. C. A.).

2. This case is one in which the United States Circuit Court of Appeals for the Sixth Circuit, in an original action brought in that court by Armour & Company, respondent herein, issued its writ of mandamus to your petitioner, ordering him as judge of the District Court of the United States for the Northern District of Ohio, Western Division, to vacate certain orders theretofore made by him, remanding five similar cases to the Court of Common Pleas of Lucas County, Ohio, from which the said five cases had been removed to said District Court. (Record, p. 71.)

Your petitioner respectfully contends that the questions involved in this case are substantial, for that it has been heretofore determined by this court that a United States Circuit Court of Appeals is without power to issue a writ of mandamus for such purpose.

3. The cases believed to sustain the jurisdiction of this court are as follows:

Employers' Reinsurance Corporation vs. Bryant, Judge, 299 U. S. 374.

Gay vs. Ruff, 292 U. S. 25.

Forsyth vs. Hammond, 166 U. S. 506.

4. The date of the judgment to be reviewed is March 12, 1940. (Record, p. 71.)

The petition for writ of *certiorari* was filed May 6, 1940, and was granted June 3, 1940.

III.

STATEMENT OF THE CASE

(All references to pages are to those of the printed record.)

On July 7, 1939, the respondent Armour & Company filed its petition in the United States Circuit Court of Appeals for the Sixth Circuit, praying for a writ of mandamus against your petitioner Frank L. Kloeb, judge of the United States District Court for the Northern District of Ohio, Western Division, commanding your petitioner, as such judge, to grant respondent's motion to set aside and vacate remanding orders made by your petitioner in five causes removed to the United States District Court from the Court of Common Pleas of Lucas County, in Ohio, and also to grant respondent's motion to amend its petition for removal in one of the five cases, known as the *Kniess* case, and to continue to proceed in all of said causes. (Record, page 2 *et seq.*)

Your petitioner, on October 27, 1939, filed a reply to said petition. (Record, page 61 *et seq.*)

On December 5, 1939, the United States Circuit Court of Appeals rendered a decision holding that respondent was entitled to the writ as prayed, but not directing the writ to issue at that time. (Record, pages 66 to 70, inclusive.)

On March 12, 1940, on petition of Armour & Company, a mandate was issued in conformity with the petition and conclusions expressed in the opinion rendered on December 5, 1939. (Record, page 71.)

The five cases ordered remanded by your petitioner, as judge of the United States District Court, were filed respectively by George E. Kniess, Marie Kniess, Louisa F. Meinecke, Herbert O. Schwalbe and Maybelle Schwalbe, at various dates between February 1, 1935, and March 2, 1935, all of them being against Armour & Company and one Charles J. Burmeister, a retail butcher in the City of Toledo, Ohio, where all the plaintiffs then resided, and still reside. (Record, page 2.)

All five petitions were filed in the Court of Common Pleas of Lucas County, Ohio, and in all material respects were identical. A copy of the petition in the *George E. Kniess* case was attached to respondent's petition, marked Exhibit A, and made a part thereof. (Record, page 3.)

Respondent, within the time allowed by law, filed an identical petition in each of said cases for removal to the District Court of the United States, and as to each gave notice of filing the same, filed bond for removal, and motion for removal. Copies of these pleadings and instruments in the *George E. Kniess* case appear in the record, pages 13 to 16, inclusive. The Court of Common Pleas denied all of said petitions for removal and later denied identical motions to reconsider these petitions for removal, filed in the five cases. (Record, page 3.)

As appears in the petition of *George E. Kniess vs. Armour & Company et al.* (Record, pages 10 to 12, inclusive), each plaintiff claimed damages for having con-

tracted the disease known as trichinosis from eating a portion of smoked sausage known as metwurst which defendant Burmeister had made from a pork product known as Boston butts, sold to Burmeister by defendant, Armour & Company, which Boston butts were adulterated, diseased and infected with parasites known as trichinae, by reason whereof the Boston butts and the metwurst made therefrom were wholly unfit, unsuitable and dangerous for consumption by the respective plaintiffs, and in violation of the Pure Food Laws of Ohio.

By agreement of counsel the *George E. Kniess* case was tried, the other four cases remaining pending until its final disposition.

While respondent's petition does not state the result of the trial of the *George E. Kniess* case in the Court of Appeals for Lucas County, yet as the record does show that the Supreme Court of Ohio reversed the judgment of the Court of Appeals, it is of course properly to be inferred that plaintiff had recovered a judgment in the Court of Common Pleas and that this was affirmed in the Court of Appeals. (Record, page 4.)

Furthermore, it appears in two affidavits in support of motion to remand, that there had been two trials of the *George E. Kniess* case in the Court of Common Pleas. (Record, pages 27 and 31.)

The fact was that at the conclusion of plaintiff's evidence on the first trial, the Court of Common Pleas directed a verdict for the defendants and entered judgment on the same. This judgment was reversed by the Court of Appeals and a new trial ordered, and the Supreme Court of Ohio refused to admit the case on motion of the defendants for an order to certify the record.

It was not until the second trial of this case that cross examination of the defendant Burmeister first elicited the fact, of which plaintiff and his counsel had no previous knowledge, that Armour & Company, when it sold these Boston butts to Burmeister, knew that Burmeister purchased them for the purpose of making metwurst out of them, and that Armour & Company actually solicited that order for that express purpose. (Record, page 27 *et seq.* and 31 *et seq.*)

Because of this lack of knowledge of that very essential fact, on the part of the various plaintiffs and their counsel, no such knowledge or concert of action had been pleaded in any of the five petitions, as may be seen from a reading of the George E. Kniess petition. (Record, page 10.)

Upon the second trial plaintiff recovered a verdict and judgment against both defendants, which was affirmed by the Court of Appeals of Lucas County, Ohio. When the case reached the Supreme Court of Ohio the judgments of the lower courts were reversed solely on the ground that the cause should be removed to the federal court because a separable controversy existed between the two defendants from the allegations of plaintiff's petition and that nothing but the plaintiff's petition could be considered by the court in determining that question.

Kniess vs. Armour & Company, 134 O. S. 432, 434. On page 440 of the opinion, the court said this:

> "While the evidence adduced at the trial shows Armour & Company *knew,* when it sold the Boston butts, that they were to be used in metwurst, there is no allegation in the petition that they had such knowledge. In passing upon the question of re-

moval, unfortunately we are limited solely to a consideration of the facts stated in the petition." (Italics ours.)

The syllabus of the *Kniess* case, which states the law of the decision (*Baltimore & Ohio Railroad Co. vs. Baillie,* 112 O. S. 567), is as follows:

"1. Where a citizen of Ohio and a citizen of another state are joined as defendants, the cause should be removed to the federal courts when a separable controversy exists between the resident plaintiff and the non-resident defendant.

"2. In an action against a packer and a retailer of food for damages resulting from the sale of unwholesome food, the liability of the packer is primary and that of the retailer secondary, and under ordinary circumstances they cannot be joined as joint tort-feasors. (*Canton Provision Co. vs. Gauder,* 130 Ohio St. 43, approved and followed.)"

An application for a rehearing filed by plaintiff, George E. Kniess, having been overruled, the mandate from the Supreme Court of Ohio was returned to the Court of Common Pleas of Lucas County. This mandate directed the Court of Common Pleas to grant the petition to remove the cause to the District Court of the United States. (Record, page 19.)

Thereafter, all five cases were removed to the District Court of the United States for the Northern District of Ohio, Western Division, on February 17, 1939. (Record page 5.)

On March 3, 1939, plaintiff George E. Kniess filed in the United States District Court a motion to remand said cause, together with two affidavits in support thereof, and on March 6, 1939, the other four plaintiffs filed their identical motions to remand their several causes, together

with an affidavit in support of each motion. (Record, page 6.)

These affidavits were of the utmost importance.

In the *George E. Kniess* case the first affidavit was by Kniess himself, and was to the effect that he was a German citizen by birth; that at the age of twenty-one he came to the United States, arriving here on September 3, 1925, and on March 3, 1928, filed his declaration to become a citizen of the United States. For reasons stated in the affidavit, affiant declared that he had never received his final certificate of naturalization, and, therefore, was still a citizen of Germany; that through a misunderstanding on his part as to his situation, he had never advised his attorneys of these facts until within a week prior to the date of this affidavit. (Exhibit J-1, Record, pages 25 *et seq.*)

The second affidavit filed in his behalf was identical in form with those filed in support of the motions for remand of the other four plaintiffs, and recited the evidence given on the second trial by the defendant Burmeister as showing that Armour & Company actually had full knowledge of Burmeister's intention to make this metwurst from the Boston butts he purchased from Armour & Company, and that Armour & Company actually solicited his order for that purpose. (Exhibit J-2, Record, pages 27 *et. seq.*, and Exhibit K-1, Record, pages 31 *et seq.*)

The respective motions to remand appear as Exhibit J, Record, page 24, and Exhibit K, Record, page 30.

On April 1, 1939, your petitioner, as judge of said United States District Court, entered an identical order in each of the five cases, sustaining the several motions to remand. (Record, pages 34 and 35.)

On April 22, 1939, respondent filed in each of these five cases in the United States District Court a motion to vacate and set aside the order of remand, which motions were overruled by your petitioner on June 22, 1939. (Record, page 7.)

Thereafter, respondent filed the instant suit in the United States Circuit Court of Appeals for the Sixth Circuit.

IV.

SPECIFICATION OF ERRORS TO BE URGED

Said United States Circuit Court of Appeals erred:

1. In holding that it had jurisdiction to order your petitioner, by writ of mandamus, to vacate orders made by him, remanding five cases to the state court from which they had been removed.

2. In ordering your petitioner to do something beyond his power to perform, that is, retake jurisdiction of these cases by vacating the remanding orders.

3. In deciding that the decision of the Supreme Court of Ohio in *Kniess vs. Armour & Co.*, 134 O. S. 432, holding that upon the allegations *of the petition alone* a separable controversy existed, foreclosed, as *res judicata*, your petitioner from considering undisputed facts properly brought to his attention, which did not appear in the petition, and which facts would require the remand of these five cases under Section 37 of the Judicial Code (28 U. S. C. A., Section 80).

4. In holding that your petitioner was bound to retain jurisdiction of the case of *Kniess vs. Armour & Company*, when it subsequently appeared that Kniess was an

alien, merely because the Supreme Court of Ohio had previously held that upon the allegations of the petition, which said nothing about his citizenship, a separable controversy existed.

5. In holding that the petitions for the removal of these five cases were sufficient to justify removal on the ground of separable controversy, although they merely alleged that one of the defendants was a non-resident of the state in which the suit was brought.

SUMMARY OF ARGUMENT

I. Applicable decisions of this court have established that the orders entered by your petitioner in each of these five cases sustaining the identical motions to remand, and made pursuant to authority vested in your petitioner by Section 37 of the Judicial Code (28 U. S. C. A. 80) were not subject to appellate re-examination by the Circuit Court of Appeals on petition for mandamus or otherwise.

II. Your petitioner cannot regain jurisdiction of these cases by vacating the orders of remand entered by him for the reason that the remanding orders reinvested the state court with jurisdiction and terminated the jurisdiction of the Federal District Court. Therefore, your petitioner is now without authority to execute the mandate of the Circuit Court of Appeals.

III. The decision of the Supreme Court of Ohio in the case of *Kniess vs. Armour & Co.*, 134 O. S. 432, did not conclude your petitioner from thereafter entering the orders sustaining the motions to remand these five cases.

A. Well recognized principles establish the distinctions between the functions and powers of the

state and federal courts in their respective determinations of the question of removability of a cause and clearly indicate the inapplicability of the general doctrine of *res judicata* or estoppel by judgment. While in certain instances it is true that the principles of *res judicata* apply to questions of jurisdiction as well as to other issues, the cases so applying the doctrine and relied upon by respondent and the Circuit Court of Appeals, are no authority for the proposition that the decision of the Supreme Court of Ohio was *res judicata* of the question of the jurisdiction of the Federal District Court.

B. The decision of the Supreme Court of Ohio was not a judicial proceeding entitled to full faith and credit within the provisions of 28 U. S. C. A. 687. However, if this court should be of the opinion that this decision of the Supreme Court of Ohio was entitled to full faith and credit under the foregoing statute, then your petitioner submits that there was no denial of full faith and credit in the instant case.

C. Assuming that your petitioner was bound to follow the decision of the Supreme Court of Ohio that upon the allegations of the petition there could be no joint liability under the Ohio law and that therefore a separable controversy existed, nevertheless that decision did not put an end to the question of federal jurisdiction. Your petitioner, pursuant to Section 37 of the Judicial Code (28 U. S. C. A. 80), could thereafter examine into the facts *sua sponte*, to determine if the controversy was properly within the jurisdiction of the Federal District Court, and upon finding to his satisfaction that it was not, was in duty bound to either dismiss or remand the cases.

IV. It has been established by applicable decisions of this court that a separable controversy to which an alien is a party cannot be removed from a State to a Federal Court, whether the alien is a plaintiff or defendant. It has been established by affidavit, and the fact is now admitted, that the plaintiff in the case of *George E. Kniess vs. Armour & Co.* was an alien and not a citizen of any state. This uncontradicted fact, therefore, established to the satisfaction of your petitioner that this controversy was not properly within the jurisdiction of the Federal District Court, and your petitioner was in fact compelled to either dismiss or remand the cause pursuant to Section 37 of the Judicial Code, *supra.*

V. The right of removal was never properly exercised in the first instance for the reason that the petitions for removal were insufficient in that they failed to allege any ground for removal. By virtue of Section 28 of the Judicial Code your petitioner had ample power and authority to enter the remanding orders for this reason alone.

VI. The decision of the Supreme Court of Ohio was not a final judgment or decree subject to review and determination by this court on writ of *certiorari* within the provisions of Section 344(b) 28 U. S. C. A. Therefore the proper procedure has been followed in the instant case. The decision of the Supreme Court of Ohio does not foreclose the plaintiffs in these cases from proceeding to a trial and determination of their rights in the State Court upon amended petitions showing the joint liability of the defendants Armour & Company and Burmeister.

V.

ARGUMENT

I. An Order Remanding a Cause to a State Court Is Not Subject to Appellate Re-examination on Petition for Madamus or Otherwise.

It is the contention of your petitioner that the orders entered in each of these five cases sustaining the motions to remand, and made pursuant to authority vested in your petitioner by Section 37 of the Judicial Code (28 U. S. C. A. 80) were not subject to appellate re-examination by the Circuit Court of Appeals for the 6th Circuit on petition for mandamus or otherwise.

The applicable statutes are part of Section 28 of the Judicial Code as amended (28 U. S. C. A. 71) and Section 37 of the Judicial Code (28 U. S. C. A. 80). The relevant portions of these statutes are as follows:

> "Whenever any cause shall be removed from any state court into any district court of the United States, and the district court shall decide that the cause was improperly removed, and order the same to be remanded to the state court from whence it came, such remand shall be immediately carried into execution, and no appeal or writ of error from the decision of the district court so remanding such cause shall be allowed." (Judicial Code Section 28 as amended, 28 U. S. C. A. 71.)
>
> "If in any suit commenced in a district court, or removed from a state court to a district court of the United States, it shall appear to the satisfaction of the said district court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially

involve a dispute or controversy properly within the jurisdiction of said district court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this chapter, the said district court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed, as justice may require, and shall make such order as to costs as shall be just." (Judicial Code Section 37, 28 U. S. C. A. 80.)

These provisions of the Judicial Code were first enacted substantially in their present form by the Act of March 3, 1887 (c. 373 §1, 24 Stat. 552, and c. 373 §6, 24 Stat. 555, as corrected and re-enacted, by the Act of August 13, 1888, c. 866, 25 Stat. at L. 433.[1])

As early as the decision in *Morey vs. Lockhart,* 123 U. S. 56, 57, 31 L. Ed. 68, decided October 1887, this court held that these provisions of the Act of 1887 were intended to apply to all cases removed from a state court and remanded to the latter. Chief Justice Waite speaking for the court in this case said:

"It is difficult to see what more could be done to make the action of the Circuit Court final, for all the purposes of the removal, and not the subject of review in this court. First, it is declared that there shall be no appeal or writ of error in such

[1] They have continued unchanged, with the exception of the substitution of "District" for "Circuit Court." Section 6 of the Act of March 3, 1887, *supra,* expressly repealed the last paragraph of Section 5 of the Act of March 3, 1875 (18 Stat. at L. 470, Chap. 137, which had provided:

"* * * that the order of said Circuit Court dismissing or remanding said cause to the State Court shall be reviewable by the Supreme Court on writ of error or appeal, as the case may be."

a case, and then, to make the matter doubly sure, the only statute which ever gave the right of such an appeal or writ of error is repealed."

However, it was not until the decision in *In Re Pennsylvania*, 137 U. S. 451, 34 L. Ed. 738, 11 S. Ct. 141 (decided 1890), that this court was required to decide the question of whether the prohibition contained in the second section of the Act of March 3, 1887, had the effect of taking away the power to review remanding orders by mandamus as well as by appeal and writ of error. This court held that the clause in the second section of the Act of 1887 covered not only appeals and writs of error, but also the remedy by mandamus.[2]

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[2] Referring to the prohibition in the second section of the Act of March 3, 1887, Mr. Justice Bradley said:

"In terms, it only abolishes appeals and writs of error, it is true, and does not mention writs of mandamus; and it is unquestionably a general rule, that the abrogation of one remedy does not affect another. But in this case we think it was the intention of Congress to make the judgment of the circuit court remanding a cause to the state court final and conclusive. The general object of the Act is to contract the jurisdiction of the federal courts. The abrogation of the writ of error and appeal would have had little effect in putting an end to the question of removal, if the writ of mandamus could still have been sued out in this court. It is true that the general supervisory power of this court over inferior jurisdictions is of great moment in a public point of view, and should not, upon light grounds, be deemed to be taken away in any case. Still, although the writ of mandamus is not mentioned in the section, yet the use of the words 'such remand shall be immediately carried into execution,' in addition to the prohibition of appeal and writ of error is strongly indicative of an intent to suppress further prolongation of the controversy by whatever process. We are therefore of opinion that the Act has the effect of taking away the remedy by mandamus as well as that of appeal and writ of error."

Since this decision and in an unbroken line of decisions during the last fifty years, this court has consistently held that an order remanding a cause to a state court is not subject to appellate re-examination on petition for mandamus or otherwise. *Fisk vs. Henarie*, 142 U. S. 459, 35 L. Ed. 1080, 12 S. Ct. 207 (1892); *Missouri P. R. Company vs. Fitzgerald*, 160 U. S. 556, 40 L. Ed. 536, 16 S. Ct. 389 (1895); *Powers vs. Chesapeake & Ohio Railroad Company*, 169 U. S. 92, 42 L. Ed. 673, 18 S. Ct. 264 (1898); *McLaughlin Brothers vs. Hollowell*, 228 U. S. 278, 57 L. Ed. 835, 33 S. Ct. 465 (1913); *In the Matter of Matthew Addy Steamship & Commerce Corporation*, 256 U. S. 417, 65 L. Ed. 1027, 21 S. Ct. 508 (1921). And this rule has been applied whether the cause is remanded under Section 28 of the Judicial Code (28 U. S. C. A. 71) or Section 37 of the Judicial Code (28 U. S. C. A. 80). *Employers Reinsurance Corp. vs. Bryant*, 299 U. S. 374, 57 S. Ct. 272, 81 L. Ed. 291 (1937); *Missouri P. R. Company vs. Fitzgerald*, 160 U. S. 556, 40 L. Ed. 536, 16 S. Ct. 389 (1895); *Maulding Brownell Corp. vs. Sullivan*, 92 F. (2d) 646 (October 1937). In *Employers Reinsurance Corp. vs. Bryant, supra*, decided as recently as 1937, this court again reaffirmed the rule of *In re Pennsylvania, supra*, holding that the prohibition against review applies both to cases remanded under Section 28 of the Judicial Code, *supra*, and those remanded under Section 37 of the Judicial Code, *supra*. The facts in this case were very similar to those in the instant case. The question being presented to this court on *certiorari* to review an order denying a petition for writs of mandamus and prohibition, commanding a judge of a federal district court to vacate an order remanding a cause to a state

court, and prohibiting him from giving any effect to it. It appeared that the remanding order had been entered pursuant to Section 37 of the Judicial Code, *supra*. In affirming the decision of the Circuit Court of Appeals this court held in this case, speaking through Justice Van Devanter on page 378 of its opinion:

> "We are of opinion the petition was rightly denied, first, because the remanding order was not subject to appellate re-examination on petition for mandamus of otherwise, and secondly, because even if open to re-examination on petition for mandamus, the order was made in the exercise of lawful authority and was appropriate to the situation in which it was made."

The court further said on pages 380 and 381 of its opinion, referring to *In Re Pennsylvania, supra*:

> "The provisions in the Act of 1887 on which that decision and others to the same effect were based are still in force as parts of §§71 and 80, 28 U. S. C. A. They are in *pari materia*, are to be construed accordingly rather than as distinct enactments, and, when so construed, show, as was held in *Morey vs. Lockhart*, 123 U. S. 56, 58, 31 L. Ed. 68, 69, 8 S. Ct. 65, that they are intended to reach and include all cases removed from a state court into a federal court and remanded by the latter."

There can be no doubt therefore that that part of Section 28 of the Judicial Code prohibiting review of remanding orders applies to appellate re-examinations on petition for mandamus or otherwise, and includes all remanding orders.

In the instant case the orders entered sustaining motions to remand were made pursuant to authority vested

in your petitioner by Section 37 of the Judicial Code. After the cases had been removed to the federal district court, uncontradicted facts were established by affidavit which made necessary the dismissal or remand of these cases by your petitioner for the reason that it was apparent that the cases were not properly within the jurisdiction of the District Court.

In view of the foregoing applicable decisions by this court, and the now well established principles governing the remanding of cases under Sections 28 and 37 of the Judicial Code, it is submitted that the orders entered by your petitioner sustaining the motions to remand in these cases were not subject to appellate re-examination on petition for mandamus or otherwise. Therefore, the United States Circuit Court of Appeals for the Sixth Circuit was without power to issue the writs of mandamus to your petitioner for the purpose of compelling your petitioner to revoke and vacate the orders of remand previously entered by him in these cases.

II. Jurisdiction of These Cases Cannot Be Regained by Vacating the Orders of Remand.

It is the contention of your petitioner that a federal district court is without authority to vacate a remanding order even during the same term, for the reason that the remanding order reinvests the state court with jurisdiction and terminates the jurisdiction of the federal district court. It is, therefore, submitted that your petitioner is now without authority to execute the mandate of the United States Circuit Court of Appeals and regain jurisdiction of these cases by vacating the orders of remand.

While ordinarily it is within the power of a federal district court to vacate orders during the same term in which they are made,[3] your petitioner maintains that remanding orders entered pursuant to either Section 28 of the Judicial Code, as amended, (28 U. S. C. A. 71), or Section 37 of the Judicial Code (28 U. S. C. A. 80), are an exception to this general rule. Section 28 of the Judicial Code, *supra,* provides in part: "Such remand shall be immediately carried into execution." The purpose of this provision is to avoid delay in the trial of cases. If it were possible for a federal district court to vacate remanding orders, the manifest intent of Congress to avoid delay in the determination and final adjudication of the question of federal jurisdiction would be seriously hampered. Upon entering an order remanding a cause to a state court from whence it has been removed, the jurisdiction of the federal district court has been completely exercised and its authority ended. In such a case there is no authority remaining under which the federal district court may act.

In *Ausbrooks vs. Western Union Tel. Co.,* (D. C. Tenn. 1921), 282 F. 733, at 734, Judge Sanford, who later became a Justice of the United States Supreme Court, said:

> "The remanding order entered herein * * * having *ex propria vigore* reinvested the state court with jurisdiction, necessarily terminated the jurisdiction of this court. And having thus lost jurisdiction of the cause, it is now without authority to vacate the remanding order * * *. The general power of a court to remand or vacate orders, judgments and decrees at any subsequent day of the term at which they were rendered, does not

[3] *Ex parte Lange,* 18 Wall. 163, 21 L. Ed. 872 (1874).

extend to cases in which the jurisdiction of the court has been completely exercised and its authority ended.'"[4]

When, therefore, your petitioner entered the orders sustaining the motions to remand these cases to the state court, the jurisdiction of the federal district court was terminated and your petitioner is now without authority to vacate said orders and execute the mandate of the United States Circuit Court of Appeals.

III. The Decision of the Supreme Court of Ohio in the Case of Kniess vs. Armour & Co., 134 O. S. 432, Did Not Conclude Your Petitioner From Thereafter Entering the Orders Sustaining the Motions to Remand These Five Cases to the State Court.

It is the contention of your petitioner that the decision of the Supreme Court of Ohio in the case of *Kniess vs. Armour & Co., supra,* in which it was held that upon the allegations of the petition there could be no joint liability under the Ohio law, and that, therefore, there was a separable controversy which should be removed to the Federal District Court, was not a conclusive determination of federal jurisdiction for the following reasons:

A. THE DECISION OF THE SUPREME COURT OF OHIO WAS NOT RES JUDICATA OF THE DETERMINATION OF FEDERAL JURISDICTION.

At this phase of the discussion it is necessary to refer to the distinctions between the functions and powers of

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[4] See also: *Empire Mining Co. vs. Propeller Towboat Co.,* (D. C., S. C., 1901) 108 F. 900; *Chisolm vs. Propeller Towboat Co.,* 59 S. Car. 549.

the state and federal courts in their respective determinations of the question of removability of a cause from a state court to a federal district court.

Section 29 of the Judicial Code (28 U. S. C. A. 72)[5] authorizes the removal of a cause from a state court to the proper Federal District Court upon the filing of a petition disclosing the right to remove and the giving of the required bond. When such petition is filed in a state court it becomes a part of the record, along with the pleadings in the case, and if, on the face of the record, as so constituted, a suit appears to be removable the

[5] "§72. (Judicial Code, section 29.) Whenever any party entitled to remove any suit mentioned in section 71 of this title, except suits removable on the ground of prejudice or local influence, may desire to remove such suit from a state court to the district court of the United States, he may make and file a petition, duly verified, in such suit in such state court at the time, or any time before the defendant is required by the laws of the state or the rule of the state court in which such suit is brought to answer or plead to the declaration or complaint of the plaintiff, for the removal of such suit into the district court to be held in the district where such suit is pending, and shall make and file therewith a bond, with good and sufficient surety, for his or their entering in such district court, within thirty days from the date of filing said petition, a certified copy of the record in such suit, and for paying all costs that may be awarded by the said district court if said district court shall hold that such suit was wrongfully or improperly removed thereto, and also for their appearing and entering special bail in such suit if special bail was originally requisite therein. *It shall then be the duty of the state court to accept said petition and bond and proceed no further in such suit.* Written notice of said petition and bond for removal shall be given the adverse party or parties prior to filing the same. The said copy being entered within said thirty days as aforesaid in said district court of the United States, the parties so removing the said cause shall, within thirty days thereafter, plead, answer, or demur to the declaration or complaint in said cause, and the cause shall then proceed in the same manner as if it had been originally commenced in the said district court." (Italics ours.)

state court in which the petition is filed is bound to surrender its jurisdiction in the case and proceed no further. Section 29, *supra*. While an examination of Section 29, *supra*, discloses no right in the state court in the first instance to pass on the sufficiency of the petition and bond for removal, such a practice, in the interest of orderly procedure has been recognized.[6]

Upon the filing of such petition the state court is faced with the determination of a pure question of law, that is to say, whether admitting the facts stated in the petition for removal to be true it appears on the face of the pleadings that the petitioner is entitled to a removal of the suit. *Burlington Cedar Rapids and Northern Ry. Co. vs. Charles L. Dunn*, 122 U. S. 513, 30 L. Ed. 1159 (May, 1887); *Donovan vs. Wells Fargo & Co.*, (Mo., 1909) 169 F. 363, 94 C. C. A. 609, 22 L. R. A. (N.S.) 1250. It is significant that in its determination of the question of removability the state court must accept as true the allegations of fact on the record. *Chesapeake & O. R. Co. vs. Cockrell*, 232 U. S. 146, 58 L. Ed. 548 (1914); *Stone vs. South Carolina*, 117 U. S. 430, 29 L. Ed. 962, 6 Sup. Ct. Rep. 799; *Crehore vs. Ohio & M. R. Co.*, 131 U. S. 240, 33 L. Ed. 144, 9 Sup. Ct. Rep. 692; *Illinois Central R. Co. vs. Sheegog*, 215 U. S. 308, 54 L. Ed. 208, 30 Sup. Ct. Rep. 101, and *Chicago R. I. & P. R. Co. vs. Dowell*, 229 U. S. 102, 57 L. Ed. 1090, 33 Sup. Ct. Rep. 684. All issues

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[6] "The orderly and proper procedure upon presenting a petition and bond for removal is to apply to the state court for a formal order granting the petition; but where this is done, and the order is refused, the cause, if a proper one for removal under the law, stands nevertheless as effectually removed from the jurisdiction of the state court as though such order had been granted." *State Improvement-Development Co. vs. Leininger*, (D. C., Cal., 1914) 226 F. 884.

of fact made upon the petition for removal must be tried in the Federal District Court. *Burlington C. R. & N. R. Ry. Co. vs. Dunn, supra; Chesapeake & O. R. Co. vs. Cockrell, supra.* The effect, therefore, of the state court's determination on the question of removability is either a retention or relinquishment of jurisdiction over the cause, as the case may be. If a state court refuses to grant the petition and bond for removal, such decision does not operate to limit the jurisdiction of the Federal District Court, for in a proper case, the petition and bond being sufficient, the party seeking to remove may nevertheless file the transcript of the record in the proper Federal District Court. *Chesapeake & O. R. Co. vs. Cockrell, supra; Donovan vs. Wells Fargo & Co., supra.* In such a case the Federal District Court may protect its jurisdiction and enjoin the plaintiff from further proceeding in the state court. *Donovan vs. Wells Fargo & Co., supra.* The theory of these cases is that on the filing in the state court in due time of an adequate petition and bond for removal, the jurisdiction of the state court absolutely ceases and that of the Federal District Court immediately attaches, *regardless of any action thereon by the state court.* Any further proceedings in the state court are invalid and void, unless its jurisdiction is actually restored. *Kern vs. Huidekoper,* (Ill., 1881) 103 U. S. 485, 26 L. Ed. 354; *Baltimore & O. R. Co. vs. Koontz,* (Va., 1881) 104 U. S. 5, 26 L. Ed. 643; *Nat. Steamship Co. vs. Tugman,* (N. Y., 1882) 1 S. Ct. 58, 106 U. S. 118, 27 L. Ed. 87; *Manning vs. Amy,* (Mass., 1891) 11 S. Ct. 707, 140 U. S. 137, 35 L. Ed. 386; *Madisonville Traction Co. vs. St. Bernard Mining Co.,* (Ky., 1905) 25 S. Ct. 251, 196 U. S. 239, 49 L. Ed. 462. Theoretically

no hearing or order of removal is necessary by the state court, because the case stands as effectively removed as though such order had been granted. *Hansford vs. Stone-Ordean Wells Co.*, (D. C., Mont., 1912) 201 F. 185; *State Improvement Development Co. vs. Leininger*, (D. C., Cal., 1914) 226 F. 884.

It was in light of the foregoing well established principles that this court held in *Chesapeake & O. R. Co. vs. McCabe*, 213 U. S. 207, 53 L. Ed. 765 (1909), that the Federal District Court has a right to determine the removability of a cause, independently of the jurisdiction and determination of the state courts. Indeed any other result would be anomalous and contrary to all established principles of law. The right of removal is established by Act of Congress which establishes the jurisdiction of the Federal District Courts so that whether a case is removable is a federal question. *Baltimore & O. R. Co. vs. Koontz, supra.*

When a state court grants the petition of removal and in effect decides to relinquish jurisdiction of the cause, the Federal District Court is then called on to take jurisdiction, but whether it will retain jurisdiction, dismiss or remand the case is a question to be independently determined by the Federal District Court. Admitting the right of the state court, however incongruous it may be, to pass in the first instance upon the question of removability, such a determination must be distinguished from the right of the Federal District Court, and in fact its duty, to determine and enforce its jurisdictional limitations pursuant to Section 37 of the Judicial Code (28 U. S. C. A. 80). As will be pointed out in III. C of this argument, *infra*, by virtue of this statute a Federal Dis-

trict Court is not limited to a determination of the right of removal or removability by the allegations in the pleadings, but it may inquire *sua sponte* into the facts to determine if the controversy is properly within its jurisdiction. Its authority in this respect is clear and unquestioned and supersedes any determination with respect to removability whether made by the state or the federal court itself in the first instance.

In view of the foregoing, it seems obvious that the general principles of *res judicata* or estoppel by judgment cannot apply in the instant case, first, to make the decision of the Supreme Court of Ohio *res judicata* of the question of removability, or second, and most clearly, to make the decision of the Supreme Court of Ohio *res judicata* of the question of federal jurisdiction. That is to say, the decision of the Supreme Court of Ohio was not a judgment upon the merits, by a court of competent jurisdiction, between the same parties involving the same cause of action.[7] We feel that a mere statement of this proposition suffices.

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[7] The doctrine of *res judicata*, where applicable, requires that issues of fact or of law once determined by a court of competent jurisdiction shall not be relitigated between the parties. *Hart Steel Co. vs. Railroad Supply Company*, 244 U. S. 294, 37 S. Ct. 506, 61 L. Ed. 1148 (1917). Mr. Justice Clarke on page 299 of the opinion made the following statement:

> "This doctrine of *res judicata* is not a mere matter of practice or procedure inherited from a more technical time than ours. It is a rule of fundamental and substantial justice, 'of public policy and of private peace,' which should be cordially regarded and enforced by the courts to the end that rights once established by the final judgment of a court of competent jurisdiction shall be recognized by those who are bound by it in every way, wherever the judgment is entitled to respect."

However, it has been urged by respondent, and the United States Circuit Court of Appeals for the Sixth Circuit has held, that the decision of the Ohio Court was *res judicata* notwithstanding the issue was one involving the jurisdiction of a federal court. The Circuit Court of Appeals relied upon three cases as sustaining this general proposition. We wish to refer briefly to these three cases to point out their clear inapplicability and the obvious misconstruction of the statement made by this court in one of these cases[8] "that the principles of *res judicata* apply to questions of jurisdiction as well as to other issues."

The first case cited, *American Surety Company vs. Baldwin,* 287 U. S. 156, 77 L. Ed. 231 (1932), involved the question of the validity of a judgment entered against the Surety Company by an Idaho court on a supersedeas bond. On motion of the Surety Company the state trial court vacated the judgment on the ground that it had been entered in violation of due process of law. On appeal the Supreme Court of Idaho reversed the order vacating the judgment, holding that the Idaho court did have jurisdiction to render the judgment. The Surety Company then applied to the Federal District Court of Idaho for an injunction to enjoin the enforcement of the judgment on the ground that it was void under the due process clause of the Fourteenth Amendment; this was denied and the bill was dismissed. The United States Circuit Court for the Ninth District reversed the decree of the Federal District Court. The two cases came before this court on *certiorari* and this court held in reversing the

[8] The statement is found in the opinion of Mr. Justice Brandeis in the case of *American Surety Company vs. Baldwin, infra.*

United States Circuit Court of Appeals and affirming the Supreme Court of Idaho that there had been an actual adjudication in the Supreme Court of Idaho on the question of the jurisdiction of the trial court which was a bar to proceedings in the federal court to enjoin the enforcement of the judgment for want of jurisdiction. It is submitted that this case is no authority for the proposition that the decision of the Supreme Court of Ohio is *res judicata* in the instant case, for the reason that the case did not involve any question of a determination by a state court of federal jurisdiction, but rather a determination by a state court of the jurisdiction of the state court. It was on page 166 of the opinion of this case that Mr. Justice Brandeis, speaking for the court, said:

> "The principles of *res judicata* apply to questions of jurisdiction as well as to other issues. *Baldwin vs. Iowa State Traveling Men's Asso.*, 283 U. S. 522, 75 L. Ed. 1244, 51 S. Ct. 517."

However, this statement by this court must be read in light of the whole opinion and the conclusion of the court, and when so read is clearly not intended to extend the application of the doctrine of *res judicata* or estoppel by judgment to the situation presented in the instant case.

The second case cited, *Baldwin vs. Iowa State Traveling Men's Assoc.*, 283 U. S. 522, 75 L. Ed. 1244, 51 S. Ct. 517 (1931), raised the question of whether a judgment of a Federal District Court of one state was *res judicata* on the question of jurisdiction over the person in the Federal District Court of another state and this court held that it was. While this case was originally removed from the state court, it is to be noted that the opinion reveals that the question of federal jurisdiction

was determined by the federal court and not the state court in the first instance. Obviously this case is not in point and it is submitted that it is absolutely no authority for the general proposition made by the United States Circuit Court of Appeals in the instant case and so earnestly urged by respondent heretofore.

The third case cited, *Treinies vs. Sunshine Mining Co.*, 308 U. S. 66, 84 L. Ed. 1 (1939), is also inapplicable. This case involved the question of whether a decree in an Idaho state court which awarded certain stock in decedent's estate to complainant and held that the judgment of a court of a sister state adjudging the stock to be the property of the defendant in the suit was rendered without jurisdiction of the subject matter, would be regarded as having denied full faith and credit to the latter judgment, so as to preclude the decree from operating as *res judicata* in a subsequent interpleader suit brought in a federal court. This court held that it would not. Obviously this case did not involve any determination by a state court of federal jurisdiction and it is therefore submitted that it is no authority for the general proposition made by the United States Circuit Court of Appeals in its opinion in the instant case. (Rec. 70.) The inapplicability of these three cases to the question of federal jurisdiction in the instant case clearly indicates that the doctrine of *res judicata* even as applied to questions of jurisdiction by the decision of this court is limited to determinations by state or federal courts of their own jurisdiction in the premises, and cannot be extended to a determination by a state court of the question of federal jurisdiction so as to conclude the federal court from making an independent determination of its own juris-

diction under Section 37 of the Judicial Code. Certainly the avoidance of unseemly conflicts between the courts of the two sovereignties must be avoided, but this result cannot be attained, in the interests of ending the shuttling of this controversy, by holding that in the instant case your petitioner *must* accept the jurisdiction relinquished by the Supreme Court of Ohio. Any such result would serve only to increase the evil sought to be avoided.

B. THERE WAS NO DENIAL OF FULL FAITH AND CREDIT TO THE DECISION AND ORDERS OF THE STATE COURT.

It has been urged by respondents in their brief opposing the petition for writ of *certiorari* and held by the United States Circuit Court of Appeals in its opinion (Rec. p. 69) that the orders entered by your petitioner in these cases sustaining the motions to remand constituted a denial to give effect to 28 U. S. C. A., Sec. 687, part of which provides that:

> "* * * The records and judicial proceedings of the courts of any state * * * shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from which they are taken."

Your petitioner submits that the decision of the Supreme Court of Ohio in the case of *Kniess vs. Armour and Co., supra,* was not a judicial proceeding within the scope of the foregoing statute and was not, therefore, entitled to full faith and credit. However, if this court should be of the opinion that this decision of the Supreme Court of Ohio was entitled to full faith and credit under the foregoing statute, then your petitioner submits that

there was no denial of full faith and credit. The Supreme Court of Ohio decided that on the facts alleged in the pleadings the case was removable and in its mandate (Rec. 19 and 20) remanded the cause to the Court of Common Pleas of Lucas County, Ohio, with instructions to grant the petition to remove the cause to the proper district court of the United States. Your petitioner did not fail to give full faith and credit to the decision of the Supreme Court of Ohio or its mandate. In entering the orders sustaining the motions to remand these causes to the state court your petitioner simply carried out the duty imposed on him by Section 37 of the Judicial Code of enforcing the jurisdictional limitations of the federal district court. There was no denial that upon the face of the pleadings a removable cause existed, there was no refusal to take jurisdiction. However, your petitioner, exercising the power conferred upon him by Section 37, *supra*, upon an examination of the uncontradicted facts established by the affidavits filed, found that the jurisdiction of the federal district court was not properly invoked, and therefore, pursuant to Section 37, *supra*, entered orders sustaining the motions to remand said causes to the state court.

For the foregoing reasons it is submitted that even if 28 U. S. C. A., Sec. 687, be held applicable to the decision of the Supreme Court of Ohio, its mandate, and the orders entered pursuant thereto by the trial court, nevertheless this statute was fully complied with to the fullest extent consistent with its manifest purpose.

C. Assuming That the Decision of the Supreme Court of Ohio Was Determinative of the Existence of a Separable Controversy on the Face of the Plaintiff's Petition, Nevertheless Such Decision Was Not Conclusive on the Existence of Federal Jurisdiction.

The question remains whether the decision by this court in the case of *Erie Railroad vs. Tomkins,* 304 U. S. 64, 82 L. Ed. 1188 (1938), is applicable to the instant case. The result of this decision was to make the state law as applied by the state courts controlling in the trial of cases in the federal courts involving questions of general as well as local and statutory state law.[9] It is submitted that this case is inapplicable to the instant case for the reason that no determination of general, local or statutory state law is in issue in this case. The question presented is whether a federal court has the power to determine its own jurisdiction, and this question involves a determination of jurisdiction under federal statutes. This being true, the rule announced in *Erie Railroad vs. Tomkins, supra,* can have no possible application. However, whether this decision be held applicable or not is immaterial. Its application would in effect only reaffirm the rule followed by this court prior to its decision in *Erie Railroad vs. Tomkins, supra,* that whether a separ-

[9] It was held in this case that the phrase "laws of the several states" in the provision of Section 34 of the Federal Judiciary Act of September 24, 1789, c. 20 (28 U. S. C. A. 725) cannot constitutionally be construed as excluding in matters of general jurisprudence the unwritten law of the state as declared by its highest court.

able controversy exists on the face of the pleadings and the record is determined by the state law.[10]

Assuming, therefore, that your petitioner was bound to follow the decision of the Supreme Court of Ohio that upon the allegations of the plaintiff's petition there could be no joint liability under the Ohio law, and that therefore a separable controversy existed, this determination did not put an end to the question of federal jurisdiction as the United States Circuit Court of Appeals erroneously concludes. (Rec. 70.) The fundamental distinctions between Section 28 and Section 37 of the Judicial Code cannot be ignored even in the interest of ending the shuttling of this controversy. Section 28, *supra*, insofar as applicable to this phase of the discussion establishes the right of removal in certain instances and deals generally with the removability of causes. On the other hand, Section 37 covers the much broader field of federal jurisdiction, and vests clear and unquestioned powers in the district court of enforcing its jurisdictional limitations. It is established that a federal district court, acting pursuant to Section 28, *supra*, in a determination of removability is limited, as is the state court, to an examination of plaintiff's pleadings at the time of the petition for removal. *Pullman Co. vs. Jenkins*, 305 U. S. 534, 59 S. Ct. 347, 83 L. Ed. 335 (1939); *Barney vs. Latham*, 103 U. S. 205, 26 L. Ed. 514 (1881);

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[10] *Norwalk vs. Air-Way Electric Appliance Corporation*, 87 F. (2d) 317, 110 A. L. R. 183 (1937); *Cincinnati N. O. & Texas Pac. Ry. Co. vs. Bohon*, 200 U. S. 221, 26 S. Ct. 166, 50 L. Ed. 448, 4 Ann. Cas. 1152; *Chicago & Alton Ry. Co. vs. McWhirt*, 243 U. S. 422, 37 S. Ct. 392, 61 L. Ed. 826; *Chicago Rock Island & Pac. Ry. vs. Dowell*, 229 U. S. 102, 33 S. Ct. 684, 57 L. Ed. 1099.

Graves vs. Corbin, 132 U. S. 571, 33 L. Ed. 462, 10 S. Ct. 196 (1890); *Louisville & N. R. Co. vs. Wangelin*, 132 U. S. 599, 33 L. Ed. 474, 10 S. Ct. 203 (1890); *Salem Trust Co. vs. Manufacturers Finance Co.*, 264 U. S. 182, 68 L. Ed. 628, 44 S. Ct. 266, 31 A. L. R. 867 (1924). It is equally well established that under Section 37, *supra*, the power of the federal district court to enforce its jurisdictional limitations is by contrast unlimited. It may inquire *sua sponte* into the question of jurisdiction and examine the facts as they really exist to determine if the controversy is properly within the jurisdiction of the court.[11] Furthermore, this section explicity charges the federal district court with the duty of enforcing these jurisdictional limitations, so that if it appears to the satisfaction of said court at any time after such suit has been removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said court, said court must proceed no further therein, but must dismiss or remand the suit to the court from whence it was removed.[12] Nor does this section prescribe any particular mode or manner in which the question of jurisdiction is to be brought to the attention of the court, nor how such ques-

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[11] *McNutt vs. General Motors Acceptance Corporation of Indiana*, 298 U. S. 178, 56 S. Ct. 780, 80 L. Ed. 1135 (May, 1936); *Wetmore vs. Rymer*, 169 U. S. 115, 120, 42 L. Ed. 682, 684, 18 S. Ct. 293 (1898); *Gilbert vs. David*, 235 U. S. 561, 59 L. Ed. 360, 35 S. Ct. 164 (1915); *North Pacific S. S. Company vs. Soley*, 257 U. S. 216, 66 L. Ed. 203, 42 S. Ct. 87 (1921).

[12] *McNutt vs. General Motors Acceptance Corp. of Indiana, supra; Gage vs. Carraher*, 154 U. S. 656, 14 Sup. Ct. Rep. 1190, 25 L. Ed. 989; *Ayers vs. Wiswall*, 112 U. S. 187, 52 Sup. Ct. Rep. 90, 28 L. Ed. 693.

tion, when raised, shall be determined. The method of raising the question has been left to the sound discretion of the federal district judge. *Wetmore vs. Rymer, supra, Gilbert vs. David, supra.* Pursuant to Section 37, the inquiry into the question of jurisdiction may be made at any stage of the proceedings. *Wetmore vs. Rymer, supra.* As recently as 1936 this court in the case of *McNutt vs. General Motors Acceptance Corp. of Ind.. supra,* said of Section 37 on page 184 of the opinion:

> "The Act of 1875, in placing upon the trial court the duty of enforcing the statutory limitations as to jurisdiction by dismissing or remanding the cause at any time when the lack of jurisdiction appears, applies to both actions at law and suits in equity. *The trial court is not bound by the pleadings of the parties, but may,* of its own motion, if led to believe that its jurisdiction is not properly invoked, *'inquire into the facts as they really exist'.*" (Italics ours.)

and this has been the view of this court for many years.

In view of the established principles of law construing these applicable sections of the Judicial Code, it may be admitted that while your petitioner in the instant case was bound to follow the decision of the Supreme Court of Ohio in its determination that upon the face of the pleadings a separable controversy existed, and while acting pursuant to Section 28, *supra,* your petitioner would be thereafter concluded from remanding these cases. However, your petitioner pursuant to Section 37 was not limited in his determination to an examination of the pleadings alone, but he could and did examine into the facts to determine if the controversy was properly within the jurisdiction of the federal district court, and

finding that it was not, he was compelled to either dismiss or remand the cases.

In the instant case the identical motions to remand properly raised the question of federal jurisdiction and authorized an inquiry into the facts. The affidavits filed in the causes establish, and they have not been contradicted, that the plaintiff in one of the causes[13] was an alien, and further that the defendant Armour & Co. knew at the time that the Boston butts were sold to defendant Burmeister, for what purpose said Boston butts were to be used, which facts were not alleged in the original pleadings filed in the state court. However, as the Supreme Court of Ohio indicated, if such facts had been alleged, they would make Armour & Company jointly liable under the Ohio law with defendant Burmeister.[14] It, therefore, became established to the satisfaction of your petitioner that the plaintiff, George Kniess, was an alien and that in all five cases in fact the defendant Armour and Company was jointly liable with the de-

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[13] The case of *George E. Kniess vs. Armour & Co. et al.*, No. 4338. See record, page 25.

[14] In the opinion by the Supreme Court of Ohio in the case of *Kniess vs. Armour & Co., supra,* the court said on page 440 of the opinion:

> "While the evidence adduced at the trial shows Armour & Company knew, when it sold the Boston butts, that they were to be used in metwurst, there is no allegation in the petition that they had such knowledge. In passing upon the question of removal, unfortunately we are limited solely to a consideration of the facts stated in the petition."

The court further said on page 444 of the opinion:

> "By analogous reasoning in the instant case Armour & Company could not possibly be jointly liable if it did not know that Burmeister was to put the Boston butts in skins and sell them for human consumption."

fendant Burmeister under the Ohio law; that in fact no separable controversy existed between the parties to these causes, and that, therefore, the controversies were not properly within the jurisdiction of the federal district court. Acting pursuant to Section 37 your petitioner then entered the orders sustaining the motion to remand these cases to the state court, thereby enforcing the jurisdictional limitations of this court consistent with the duty imposed by statute.

IV. A Case Is Not Removable on the Ground of Separable Controversy Where Plaintiff Is an Alien.

It is the contention of your petitioner that when it was established upon the filing of the affidavit in the Federal District Court, and this fact is now admitted, that the plaintiff in the case of *George Kniess vs. Armour & Co.* was an alien and not a citizen of any state, it became apparent that this controversy was not properly within the jurisdiction of the Federal District Court and your petitioner, pursuant to Section 37, *supra,* was bound either to dismiss or remand the cause to the state court from whence it had been removed.

Part of Section 28 of the Judicial Code as amended (28 U. S. C. A. 71) provides that a suit may be removed from a state court to the proper Federal District Court on the ground that a separable controversy exists where the suit is "wholly between citizens of different states." In *King vs. Cornell,* 106 U. S. 395, 2 L. Ed. 60 (1882), this provision of Section 28, *supra,* received a literal interpretation when this court held that it excluded aliens from the privilege of removing separable controversies. In reaching its decision in this case the court felt that the

omission of aliens from the foregoing provision was the deliberate intention of Congress.[15] This decision has been consistently affirmed, and it is now unanimously held that a separable controversy to which an alien is a party cannot be removed from a state to a federal court irrespective of whether the alien is a plaintiff or defendant. The theory of these decisions is that since the decision in *King vs. Cornell, supra,* had established that an alien who is a party to a separable controversy is not given a right to remove a cause, the converse of this proposition must be equally true, that is to say, one of several defendants who is a citizen of the United States is not authorized to remove a cause on the ground that there is a separable controversy between himself and an alien plaintiff.[16]

In view of these applicable decisions interpreting this part of Section 28, *supra,* and the uncontradicted fact that the plaintiff in the case of *George Kniess vs. Armour & Co.* was an alien, it is obvious that this controversy was not within the jurisdiction of the Federal District Court and was therefore properly remanded.

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[15] This provision first appeared in the Act of 1875, which repealed Subdivision 2 of Section 639 Revised Statutes. Subdivision 2 originally gave this right to aliens and was not restored by the Act of March 3, 1887.

[16] *Compania Minera y Compradora de Metales Mexicano S. A. vs. The American Metal Company,* 262 F. 183 (D. C., N. D. Texas, 1920); *Creagh vs. Equitable Life Assurance Society of the United States,* 88 F. 1 (C. C. D. Wash., 1898); *Tilman vs. Russo-Asiatic Bank,* 51 F. (2d) 1023 (C. C. A. 2d) 1931; *Laden vs. Meck,* 130 F. 877 (C. C. A. 6th, 1904).

V. The Petitions for Removal Were Insufficient to Warrant a Removal on the Ground of Separable Controversy.

It is the contention of your petitioner that the five identical petitions for removal filed in these cases[17] in failing to allege the existence of a separable controversy and in alleging only diversity of citizenship were insufficient and did not entitle the respondent to remove the causes to the Federal District Court or properly raise the issue of separable controversy in the Federal District Court. It is submitted that therefore the United States Circuit Court of Appeals erred in holding that these petitions were sufficient to justify removal in the first instance.

In a previous part of this argument (III. C., *supra*) we have assumed, for the purpose of argument, that your petitioner might be bound to follow the decision of the Supreme Court of Ohio holding that on the face of the pleadings no joint liability existed under the Ohio law and that therefore a separable controversy existed which should be removed to the Federal District Court. At this phase of the discussion we submit the proposition that the right of removal was never properly exercised in the first instance for the reason that the petition for removal failed to allege any valid ground for removal of the causes to the Federal District Court. An examination of the petitions for removal[18] indicates that the only

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[17] The petition for removal attached to the petition for writ of mandamus as Exhibit "B" (Record p. 13) is one of five identical petitions filed in the five cases.

[18] Ib.

ground for removal alleged, and that only by inference, was the existence of diversity of citizenship. There was no allegation of separable controversy. There was, therefore, no ground for removal alleged because where, as in the instant case, resident and non-resident defendants are joined, there is no right of removal unless there is a separable controversy. *Peper vs. Fordyce*, 119 U. S. 469, 30 L. Ed. 435 (1886).

There is substantial authority to support the proposition that the petition for removal must allege the ground for removal.[19] The theory of these decisions is that insofar as the right of removal exists in only certain enumerated classes of cases, to exercise the right it must be shown that the case comes within one of these classes.[20] This must be done by the petition for removal consistent with the ordinary rules of pleading. *Donovan vs. Wells Fargo & Co., supra.* As the court in *Gates Iron Works vs. James E. Pepper & Co., supra,* said on page 451 of its opinion:

> "• • • the court is strongly inclined to the opinion that a petition for removal must of itself distinctly show and point out the separable controversy, name the parties to it, and state all the grounds upon which the petitioner relies, and not leave the court to grope through the record to find, perchance, something lurking there which, outside the petition, would justify the removal."

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[19] *Chesapeake & O. R. Co. vs. Cockrell,* 232 U. S. 146, 58 L. Ed. 544 (1914); *Gates Iron Works vs. James E. Pepper & Co.,* (C. C., Ky., 1899) 98 F. 449; *Goetz vs. Interlake S. S. Co. et al.,* (D. C., N. Y., 1931) 47 F. (2d) 753; *Keller vs. Kansas City, St. L. & C. R. R.* (C. C., Mo., 1903) 135 F. 202.

[20] *Chesapeake & O. R. Co. vs. Cockrell,* 232 U. S. 146, 58 L. Ed. 544 (1914), on page 151 of the Opinion.

In the interest of orderly procedure, it should not fall upon the state or Federal District Court to look through the record to determine if a ground for removal exists. It is the duty of the petitioner for removal to specifically state the ground for removal.

In failing to allege any ground for removal the petitions for removal of these cases were therefore insufficient and demurrable on their face, and the state court might properly have declined to order the removal. However in permitting their removal, the question of the right of removal then confronted the Federal District Court, but no specific ground for removal being alleged, no issue could be raised by motion to remand. It is submitted that therefore the issue of separable controversy was never before the Federal District Court.

The right of removal never being shown to exist in the first instance, or properly exercised, your petitioner had ample power and authority by virtue of Section 28 of the Judicial Code, *supra*, to enter the orders sustaining the motions to remand, for this reason alone. The United States Circuit Court of Appeals, therefore, erred in holding that these petitions for removal were sufficient to justify removal in the first instance.

At this part of the discussion we call attention to the point made on page 11 of respondent's brief opposing the petition for writ of *certiorari*. Respondent states that as to one of the five cases involved,[21] after it was shown that the plaintiff was not in fact a citizen of Ohio, but an alien, respondent promptly filed a motion to amend the

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[21] The case of *George Kniess, Plaintiff, vs. Armour & Company and Charles J. Burmeister, Defendants*, No. 4338, Record p. 25.

petition for removal to show, if it was a fact, that the plaintiff was an alien. Attention is called to the fact that the federal court made no ruling on this motion. It is submitted that this point is immaterial, and can in no manner aid respondent. That is to say, assuming that the petition for removal had been amended to show that the plaintiff was an alien, this allegation would not have corrected the insufficiency of the petition for the reason that this fact alone would not establish any right of removal. Furthermore, this fact in addition to a specific allegation of separable controversy would likewise fail to establish any right of removal, for the reason that a separable controversy cannot be removed to the federal courts where the plaintiff is an alien (IV., *supra*, this argument).

VI. The Proper Procedure Has Been Followed in This Case.

It is the claim of defendant Armour & Company, respondent herein, that the proper procedure has not been taken in the instant case, that the proper procedure was to petition this court for a writ of *certiorari* to review the order of reversal made by the Supreme Court of Ohio in the case of *Kniess vs. Armour & Co., supra*, as provided in Section 344(b) (28 U. S. C. A.).[22]

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[22] Section 344(b) (28 U. S. C. A.) is as follows:

"It shall be competent for the Supreme Court, by *certiorari*, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a state in which a decision could be had where is drawn in question the validity of a treaty or statute of the United States; or where is drawn

To state this proposition is to condemn it. The decision of the Supreme Court of Ohio was not a final judgment or decree subject to review and determination by this court on writ of *certiorari* within the applicable provisions of the foregoing statute. That decision did not draw in question the validity of a treaty or statute of the United States, or the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties, or laws of the United States. Nor did that decision deny any federal title, right, privilege or immunity, to either party. Had the Supreme Court of Ohio affirmed the judgment of the lower courts and thereby refused to permit the respondent to remove the case to the Federal District Court, then there would have been a denial of a federal right. That is to say, the right to have the case removed to the Federal District Court. In such a case the judgment or decree of the Supreme Court of Ohio might be subject to review and determination by this court on writ of *certiorari*, otherwise not.

However, all that was decided by the Supreme Court of Ohio was that on the face of the pleadings there was

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in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties, or laws of the United States; or where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States; and the power to review under this paragraph may be exercised as well where the federal claim is sustained as where it is denied. Nothing in this paragraph shall be construed to limit or detract from the right to a review on a writ of error in a case where such a right is conferred by the preceding paragraph; nor shall the fact that a review on a writ of error might be obtained under the preceding paragraph be an obstacle to granting a review on *certiorari* under this paragraph."

no joint liability under the Ohio law, that on the face of the pleadings a separable controversy existed which should be removed to the Federal District Court. The Supreme Court of Ohio therefore reversed the judgments of the lower courts and remanded the cause with instructions to grant the petition for removal.[23] There was, therefore, no denial of a federal right or any question left for review and determination by this court on writ of *certiorari*. Thereafter and upon the removal of these five cases to the Federal District Court, the jurisdiction of the state courts was extinguished. The proper procedure then was to raise the question of federal jurisdiction by motions to remand, which was done. Had these motions been denied, the respective plaintiffs could have appealed because the refusal to remand is not subject to the prohibition against appellate re-examination hereinbefore discussed (I.). It is obvious, therefore, that the proper procedure was followed in the instant case.

An examination of the opinion of the United States Circuit Court of Appeals (Record, page 66 *et seq.*) indicates that that court based its decision, in part at least, upon the mistaken belief that the plaintiff, George Kniess, is now foreclosed from proceeding to trial in the state courts. The Circuit Court of Appeals expressed the opinion that the plaintiff could not amend his pleadings in the state court to show joint liability against the defendants Armour & Company and Burmeister. This is a misconception of the Ohio law because the plaintiff in this case can amend his pleadings in the state court to show joint liability against the defendants and so proceed to a final

[23] The mandate of the Supreme Court of Ohio appears on pages 19 and 20 of the record.

determination of the case in the state courts. This is so notwithstanding the decision of the Supreme Court of Ohio that on the face of the original petition a separable controversy existed between the defendants.

Ohio General Code, Section 11309(5)[24] provides that the defendant may demur to the petition (plaintiff's original pleading) where there is a misjoinder of parties plaintiff or defendant.

Ohio General Code, Section 11365[25] permits the amendment of the pleadings where a demurrer is sustained because of the misjoinder of parties plaintiff or defendant.

In reaching its decision the Supreme Court of Ohio held that on the face of the pleadings there was no joint liability, thereby in effect sustaining the demurrer filed by the defendants on the ground of misjoinder of parties defendant.

In view of the foregoing Ohio statutes, had there been no question of removability involved, an amendment would have been allowed by the state court. Now, however, with the case remanded to the state court by your petitioner, if his action be upheld by this court, the question of removability must be no longer an issue in the state court, and the case will stand as if that question

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[24] "Sec. 11309. The defendant may demur to the petition only when it appears on its face either:

* * * * *

"5. That there is a misjoinder of parties plaintiff or defendant;"

[25] Ohio General Code, Section 11365, as far as here pertinent reads:

"If the demurrer be sustained, the adverse party may amend if the defect thus can be remedied, with or without costs as the court directs."

had never been involved. Under these circumstances, it is obvious that the plaintiff may amend his petition to show joint liability of both defendants pursuant to the foregoing Ohio statute, and proceed to trial and final determination of his rights upon the petition as so amended.

Furthermore, and in addition to the right to amend under O. G. C. Section 11365, *supra*, the plaintiff, George E. Kniess, also had a right to amend his petition pursuant to O. G. C. Section 11363.[26] On the trial of the case before a jury in the state court facts were proven which had they been alleged in plaintiff's petition, would have shown the joint liability of Armour & Company and Burmeister. Under O. G. C. Section 11363, *supra*, plaintiff, George E. Kniess, has a right to amend his petition to conform to these proven facts, and thus show joint liability of both defendants. This statute vests broad discretionary powers in the trial court, and has been liberally applied—its fundamental purpose being to permit amendments in the furtherance of justice.[27]

Under the foregoing Ohio statutes the petitions in the other four cases may be amended in the state court to show joint liability of the defendants.

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[26] "Section 11363. Before or after judgment, in furtherance of justice and on such terms as it deems proper, the court may amend any pleading, process, or proceeding, by adding or striking out the name of any party, or by correcting a mistake in the name of a party or a mistake in any other respect, or by inserting other allegations material to the case, or, when the amendment does not substantially change the claim or defense, by conforming the pleading or proceeding to the facts proved. When an action or proceeding fails to conform to the provisions of this title, the court may permit either to be made conformable thereto, by amendment."

[27] *Bochmke vs. Traction Co.*, 88 O. S. 156, 102 N. E. 700.

Therefore, it being obvious that these cases may be tried and the rights of the parties fully and completely determined in the state courts upon amended petitions showing joint liability of the defendants, and said cases having been rightfully remanded to the jurisdiction of the state court must remain there, as only by so doing can the shuttling of this controversy between the two jurisdictions come to an end, and further unseemly conflicts between the federal and state courts be avoided.

CONCLUSION

It is respectfully submitted that for the reasons heretofore assigned, the Circuit Court of Appeals clearly exceeded its powers in issuing this writ of mandamus against your petitioner, and that its decision should be reversed, and your petitioner sustained as having properly exercised his judicial powers and discretion in the premises.

Respectfully submitted,

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